

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2038

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. ANTHONY BRUNO,
Petitioner-Appellant,

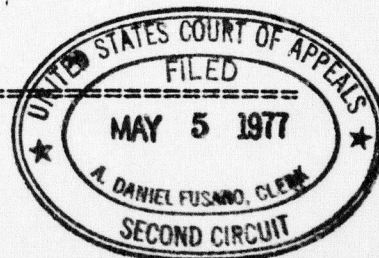
-against-

J. EDWIN La VALLEE, Warden of Clinton
Prison, Dannemora, New York,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

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Prison, Dannemora, New York, :

Respondent-Appellee. :

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BRIEF FOR PETITIONER-APPELLANT

Preliminary Statement

This is an appeal from the denial, without a hearing, of a petition for a writ of habeas corpus by the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York. Jurisdiction is predicated upon Section 2241(d), Title 28 of the United States Code (1970).

The petition was denied by the District Court for the Eastern District of New York, Platt, J., on April 15, 1975. On February 24, 1977, this Court granted petitioner's motion for a certificate of probable cause, for leave to proceed in forma pauperis, and for the assignment of counsel. Present counsel was thereafter appointed by this Court to represent petitioner.

Issues Presented

The instant petition raises two issues, each relating to identification:

(1) Whether coercive and suggestive statements made by the state court judge to the prosecution's sole identifying witness, before he testified, were so likely to have colored the witness' testimony that petitioner was denied a fair trial in violation of Fourteenth Amendment due process.

(2) Whether exhibiting petitioner, grouped with his co-defendants, to the same witness, in two consecutive pretrial show-ups, made the witness' identification of petitioner so untrustworthy as to deny petitioner due process under the Fourteenth Amendment.

Statement of Facts

The instant proceeding arises out of the 1947 conviction in a joint trial, in New York state court, of petitioner and two co-defendants, for robbery. The conviction was based solely upon eyewitness testimony of a single witness, as the prosecution introduced no fingerprints or other physical evidence, no confessions and no other testimony linking any of the defendants to the robbery.

It is submitted that to convict petitioner on the basis of the testimony of this single witness denied petitioner due process of law. As is described in detail below, the eyewitness identification of petitioner was fatally unreliable, first because the testimony was elicited by highly improper, suggestive and coercive instructions given by a state court judge; and second because the testimony was the product of two improperly suggestive show-ups, where the witness lacked an independent basis for identification.

A. The State Court Proceeding

The night of December 11, 1946, the Cirillo Brothers Coal & Fuel Corporation, located in Brooklyn, was robbed. (Indictment, Appendix, p. 32). The sole witness to the robbery was Vincent DiBari ("DiBari"), the night watchman. DiBari's first account of the robbery was that it was carried out by three men who tied him to a chair facing the wall and told him not to look around. (Complaint filed by DiBari in Felony Court on April 5, 1947, quoted infra, pp. 3-4). Four months after the robbery, petitioner Anthony Bruno, a resident of the neighborhood, was arrested at his home. Two other men, Dominick Carlucci and Louis Loffredo, were also arrested, one at his home and one at his store. (Trial Transcript, p. 115; Appendix, p. 126). The state

court record reflects no fingerprints or other physical evidence linking any of these men to the robbery.

The three men were taken to the 64th Precinct and placed together in a room, where on the evening of April 4, 1947, they were jointly shown up to DiBari. According to the testimony of Detective McNally, who was present at the stationhouse, the three men were the only persons in the room when DiBari was admitted to view them. (Trial Transcript, p. 116; Appendix, p. 127). The record reflects that DiBari may have shrugged at this show-up, indicating lack of recognition. (Trial Transcript, pp. 104-5; Appendix, p. 115-16). Later the same night petitioner and the two other men were transferred to the 66th Precinct, where they were again placed together in a room. DiBari was then taken to the 66th Precinct where, at about 12:30 A.M. on April 5, 1947, a second joint show-up was conducted, by having DiBari enter the room where the three men were being held.

Later that morning, after the show-ups, DiBari made the complaint referred to supra, in which he narrated an account of the robbery to the court clerk. As quoted in the trial transcript, this complaint, dated April 5, 1946, and made under oath reflects that DiBari had no opportunity to identify the men who robbed the coal company, because one of the robbers put a gun to DiBari's back, told him not to look

around, and placed him in a chair facing the wall:

"The defendant Loffredo took either a revolver or a pistol from his pocket and pressed it against deponent's back and told deponent not to look around, and put deponent on a chair facing the wall." (Complaint as quoted in Trial Transcript, p. 92; Appendix p. 103).

Petitioner Bruno was indicted along with Loffredo and Carlucci, and on May 21, 1947 a joint trial was commenced in the Brooklyn County Court before the Hon. Louis Goldstein, County Judge. A mistrial was declared on May 22, 1947 because DiBari was unwilling to testify that Bruno, Loffredo and Carlucci were the men who robbed him. After the jury was excused Judge Goldstein proceeded to interrogate DiBari, who stated he had been threatened. However, it is somewhat unclear from the transcript* of the hearing whether DiBari's unwillingness to identify Bruno, Loffredo and Carlucci stemmed from that fact, or from the fact that he had never seen the robbers well enough to be able to identify them.

Judge Goldstein proceeded to characterize Bruno, Loffredo and Carlucci as "notorious gunmen and robbers" "with records as long as your arm", and told DiBari that if

* See portion of Mistrial Transcript quoted infra, pp. 4-5 this brief, where Judge Goldstein accuses DiBari of having been "fixed up" in the case, and DiBari denies he was "fixed up" and says "I told you before so I won't put you in trouble or anybody else here. I don't want you to continue with a case where I know I will lie. I told you before I do not want to lie in a case." (Emphasis added)

DiBari did not testify that they were the three men who had robbed him, the Judge would have DiBari prosecuted instead of the three defendants. Finally, the Judge told DiBari that the three defendants had been identified as having shot and almost killed a policeman in Queens, and that they would be held for that crime. Judge Goldstein's exact words were as follows:

"THE COURT: I am going to give you the protection that the Court thinks you are entitled to, and at the same time I also want to warn you that if you do not stick to the truth in this case, and tell exactly what happened, and what you told before the Grand Jury, with reference to these three notorious gunmen and robbers. If you want to take their place in this courtroom, and be a defendant, instead of these three notorious gunmen and robbers, that have records as long as your arm, I will give you that opportunity. I will hold you in \$50,000.00 bail, and I am going to direct the District Attorney, when he puts you into custody, not to put you in Raymond Street jail, but some place else, and if any one attempts to come near you or to your home, I want you to notify the police; and for your own information, I will also tell you this, and for your peace of mind, that these three gunmen will be held in Queens County on another robbery case, where they shot a policeman and almost killed him, and they have got their identification there too, and if there is any more 'fixing' to be done, at least in your own case, you ought to have your conscience clear, that you are going to come across and tell the truth here.

"MR. DE BARI: I am telling the truth.

"THE COURT. You owe that to the community to have these three notorious gunmen not let loose in our community.

"MR. DE BARI: I did not get 'fixed up' in this thing here.

"THE COURT: That is the reason I had to declare a mistrial here because of your attitude.

"MR. DE BARI: I told you before so I won't put you in any trouble or anybody else here. I don't want you to continue with a case where I know I will lie. I told you before I do not want to lie in a case.

"THE COURT: You were frank enough to tell me your situation.

"MR. HELFAN: [the Assistant District Attorney] Except that I might point out to Your Honor that this witness will be told, when the case resumes for trial, whenever that is, if he wants to take the stand and lie, he will be confronted with his testimony before the Grand Jury, and if he admits in open court that he is lying, in that event we intend to indict him and prosecute him for perjury, as Your Honor has already indicated to him. Perhaps the time that he is in custody he can think this over." (Emphasis added). (Mistrial Transcript, pp. 6-8; Appendix, pp. 11-13; Full Mistrial Transcript at Appendix, pp. 4-15).

The Judge then questioned DiBari's employers, the Cirillo brothers, and instructed them to talk to DiBari to convince DiBari to testify that defendants were the robbers, stating, inter alia:

"THE COURT: . . . I wish you would try to talk to this gentleman, for his own good, and that he should stand by the People in this case and to tell the truth about it, because what happened to you people could happen to anybody in our community, and to have these three gunmen defy law and order in our community to this extent, would be a shameful situation. It is a pitiful situation. This is a direct stab at law and order in our community, after the police have done their duty and arrested these three gunmen, with the long records that they have, and if I can do anything in my power to keep them in jail, I will do so.

There is no reason why they should not be convicted in this case, and if they go to trial and are acquitted because of this man's fear to tell the truth, would be a travesty upon justice. I am sure that you gentlemen will not tolerate anything of the kind. You men have been in business in our community and have fine reputations, and I will call upon all of you to help us out. This man has taken a very foolish stand here." (Mis-trial Transcript, p. 9; Appendix, p. 14).

One week later the case was retried to a jury, the Hon. Samuel S. Leibowitz presiding. The sole evidence linking Bruno, Loffredo and Carlucci to the crime was the identification by DiBari, who was testifying under Judge Goldstein's instructions. DiBari testified, on direct examination, that he had identified the three men as the robbers at the show-ups (Trial Transcript, pp. 78-9; Appendix, p. 89); but admitted on cross that he may have shrugged, indicating non-recognition, after the first show-up. (Trial Record, pp. 104-5; Appendix, pp. 115-16). He then made an in-court identification. (Trial Transcript, pp. 68, 78, 80; Appendix, pp. 79, 89, 91).

Even taking his trial testimony (Trial Transcript, pp. 61-111; Appendix, pp. 72-122) at face value, DiBari's sole opportunity to recognize the robbers' faces was a three second* period between when he opened the door and was confronted by three men standing -- one in front and two in

* (Trial Transcript, p. 98; Appendix, p. 109).

back -- on the landing outside of a narrow doorway;* and during which time the man identified as Loffredo** stuck a gun in DiBari's stomach and DiBari was told to turn around.*** DiBari was then tied up, first in a chair facing the office wall and then facing the garage wall and had no further opportunity to view the robbers. The area around the doorway was unlighted. The only light anywhere nearby was a single, shaded, 150 watt bulb hanging 20 feet behind DiBari, on the far side of the office and separated from him by a glass and wood partition (Trial Transcript, pp. 56-57, 66, 84-87, 119-23, 126; Appendix, pp. 67-68, 77, 95-98, 137). DiBari, who testified he wore glasses "for reading and driving" admitted on cross-examination that he was not wearing them at the time of the robbery. (Trial Transcript, p. 80; Appendix, p. 91).

The jury found each of the three defendants guilty. (Trial Transcript, pp. 152-55; Appendix; p. 163-66). On September 12, 1947, Bruno was sentenced, as a third offender, to 30-60 years for Robbery First Degree, Grand Larceny First Degree and Assault Second Degree. (Appendix, pp. 173-74). Because he should have been sentenced as a second offender, he was resentenced on June 2, 1961, as a second offender, and was given the same 30-60 year term. Petitioner was paroled on

* (Trial Transcript, pp. 68-69; Appendix, pp. 79-80).

** (Trial Transcript, pp. 68-69; Appendix, pp. 79-80).

*** (Trial Transcript, p. 69; Appendix, p. 80).

May 10, 1974, at age 60. His parole will not expire until the year 2007 and his parole terms include, inter alia, reporting provisions, residence restrictions, employment restrictions, travel restrictions, and restrictions on the company he keeps. (Appendix, p. 238).

B. Exhaustion of State Court Remedies

As noted by Judge Platt in his opinion below, petitioner exhausted the questions raised by the instant petition by means of coram nobis petitions filed in Kings County Supreme Court. Judge Goldstein's comments were challenged by a petition dated March 9, 1970 (Appendix, pp. 181-91). That petition was denied, without a hearing, by order dated November 17, 1970. (Appendix, p. 191A). The Appellate Division, Second Department, denied leave to appeal on February 7, 1973 (Appendix, p. 191B); and on April 9, 1973 the New York Court of Appeals denied leave to appeal. (Appendix, p. 191D). The unnecessarily suggestive show-ups were challenged by a petition dated May 1, 1972. (Appendix, p. 191E). This second petition was denied by the Kings County Supreme Court, without a hearing, on June 16, 1972. (Appendix, p. 192). The Appellate Division, Second Department, denied leave to appeal on August 7, 1972. (Appendix, p. 193). And on September 18, 1972, the Court of Appeals advised Bruno that it

lacked jurisdiction to hear an appeal from the Second Department denial. (Appendix, p. 194).*

C. Decision of the District Court

The instant petition was originally filed in the Northern District of New York, where it was denied by the Hon. Edmund Port, United States Judge for the Northern District of New York, on November 20, 1972. Judge Port denied Bruno's application for a certificate of probable cause on December 16, 1972. On February 26, 1973 this Court also denied Bruno's application for a certificate of probable cause, but remanded

* Petitioner has never previously sought relief in Federal Court on the claims raised in his present petition. Petitioner filed one prior habeas petition on a different ground (denial of a public trial). That proceeding was U.S. ex rel. Anthony Bruno v. Agnew, 71 Civ. 10155, filed in the Northern District of New York. The petition was granted by Judge Foley, 246 F.Supp.363 (N.D.N.Y. 1965); then reversed by this Court, 368 F.2d 187 (2nd Cir. 1966), rev'd on remand, 271 F.Supp. 491 (N.D.N.Y. 1967), rev'd, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957 (1970).

the matter with leave to file an amended petition. Bruno filed an amended petition on May 7, 1973. By memorandum-decision dated February 20, 1974 (Appendix, p. 218), Judge Port ordered that a hearing be held on the amended petition, and, pursuant to 28 U.S.C. § 2241(d), ordered the proceeding transferred to the Eastern District of New York where it was assigned to Judge Platt. Judge Platt denied the petition, without a hearing, by memorandum and order dated April 15, 1975 (Appendix, 222), and by supplemental memorandum and order dated October 23, 1975, denied petitioner's application for a certificate of probable cause. (Appendix, p. 234).

Judge Platt's opinion focused only on the show-up issue and did not discuss the conduct of Judge Goldstein in the mistrial hearing at all. On the show-up issue, the decision implied that the show-ups were unnecessarily suggestive; but concluded that the identification was reliable because DiBari had had an independent opportunity to view and identify the robbers. As will be discussed infra, Judge Platt, in reaching this conclusion, apparently considered only DiBari's opportunity to view the robbers as a group, rather than his opportunity to view the only individual in the group who could have been petitioner.

Argument

I. THE CONDUCT OF STATE JUDGE GOLDSTEIN
WAS SO OVER-REACHING THAT IT DENIED
A FAIR TRIAL, IN VIOLATION OF THE
DUE PROCESS CLAUSE OF THE FOURTEENTH
AMENDMENT

It is a judge's duty to be and appear to be impartial; he must not give even the appearance of favoring the prosecution. E.g., United States v. Persico, 305 F.2d 534 (2d Cir. 1962); United States v. Brandt, 196 F.2d 653 (2d Cir. 1952); Herman v. United States, 289 F.2d 362 (5th Cir.), cert. denied, 368 U.S. 897 (1961). When a judge fails in this obligation he denies a fair trial. See United States v. Nazaro, 472 F.2d 302 (2d Cir. 1973); Killilea v. United States, 287 F.2d 212 (1st Cir.) cert. denied, 366 U.S. 969 (1961); Bursten v. United States, 395 F.2d 976 (5th Cir. 1968); United States v. Brandt, supra.

There are many manners in which a judge may unfairly increase the chances of conviction. He may tell the jury he believes the defendant is guilty, e.g., United States v. Link, 202 F.2d 592 (3d Cir. 1953), McBride v. United States, 314 F.2d 75 (10th Cir. 1963), Davis v. United States, 227 F.2d 568 (10th Cir. 1955): (reversal required where judges stated their beliefs defendants were guilty). Or the judge may imply to the jury that he believes the defendant is guilty by the manner in which he questions the defendant or

defense witnesses, or by statements he makes to them, e.g., United States v. De Sisto, 289 F.2d 833 (2d Cir. 1961) (reversal required despite corrective instruction where judge derogated defendant's attempt to demonstrate an alibi); United States v. Brandt, supra (fair trial denied by judge's cross-examining defense witnesses and defendant to bring out inconsistencies). Killilea v. United States, supra (fair trial denied by judge's manner of cross-examining defense witnesses, restricting cross-examination of prosecution witnesses, etc.). Or, a judge may derogate defense counsel and the defense. United States v. Ah Kee Eng, 241 F.2d 157 (2d Cir. 1957) (reversal required where trial judge disparaged defense counsel and defense). Or the judge may, by conduct out of the presence of the jury, create an atmosphere that biases the trial. E.g., United States v. Nazzaro, supra (fair trial denied because comments in and out of the presence of the jury created a biased atmosphere). A judge may call witnesses essential to the prosecution's case, which the prosecution failed to call; United States v. Karnes, 531 F.2d 214 (4th Cir. 1976) (fair trial denied where judge called two witnesses essential to the prosecution's case, and which the prosecution had failed to call, without giving an explanatory instruction). Finally, as here, a judge can unfairly influence the outcome of a trial by influencing the testimony of a key witness; Garrett v. Bounds, 328 F.Supp.

1175 (W.D.N.C. 1971); United States v. Pena- Garcia, 505 F.2d 964 (9th Cir. 1974) (fair trials denied where judges intimidated defense witnesses), which is perhaps the most effective method of influencing the outcome of a trial.

Judge Goldstein tried to influence DiBari's testimony by two different techniques, each of which was highly improper. The first technique was to try to convince DiBari that Bruno, Carlucci and Loffredo were guilty and that DiBari should by his testimony incriminate them. The method was to tell DiBari that the three men had long criminal records, they had committed still other crimes for which they would also be prosecuted, that they were men of bad character, and that it was DiBari's civic duty to convict them.

The specific comments were:

(1) telling DiBari repeatedly that Bruno, Carlucci, and Loffredo were "notorious gunmen and robbers", "gunmen" and "notorious gunmen";

(2) telling DiBari "you owe that to the community to have these three notorious gunmen not let loose in our community";

(3) telling DiBari repeatedly that the three men had long prior records ("records as long as your arm"); and

(4) telling DiBari the three men had shot and killed a policeman in Queens, would be held for that offense, and had been identified in relation to that offense.

The Judge also enlisted DiBari's employers to help convince DiBari to "stand by 'he People in this case."

In case DiBari was not brought over to the Judge's way of thinking by persuasion, Judge Goldstein's second approach was to threaten to prosecute DiBari for perjury unless DiBari repeated the (incriminating) testimony he had given to the grand jury. Specifically Judge Goldstein stated:

"If you do not . . . tell . . . what you told before the Grand Jury . . . I will give you that opportunity [to take their place in this courtroom.]" (Appendix, p. 11)

Judge Goldstein underscored this threat by ordering DiBari held as a material witness. Assistant District Attorney Helfand repeated the threat that DiBari would be prosecuted, and invited DiBari to "think over" what the Judge had advised while DiBari was in jail. Either Judge Goldstein's "persuading" comments or his "threatening" comments, taken alone, were so likely to influence DiBari's testimony as to make a subsequent fair trial exceedingly unlikely. Taken together, the danger that Judge Goldstein's comments unduly influenced DiBari's subsequent testimony is undeniable.

Denial by a state court of the Sixth Amendment right to a fair trial violates the due process clause of the Fourteenth Amendment; e.g., Baker v. Hudspeth, 129 F.2d 779, 781 (10th Cir.), cert. denied, 317 U.S. 681 (1942); Adamson v. California, 332 U.S. 46 (1947). See Lisenba v. California, 314 U.S. 219 (1941) (due process is offended when a state trial is conducted in a manner which is fundamentally unfair).

The law is settled that habeas corpus relief is appropriate where the conduct of a state court judge or prosecutor has been so prejudicial or over-reaching as to deprive petitioner of a fair trial. E.g., Garrett v. Bounds, supra; United States ex rel. Wilcox v. Pennsylvania, 273 F.Supp. 923 (E.D.Pa. 1967) (habeas granted because state trial judge in trial to court, announced verdict before allowing defense attorney to sum up); United States ex rel. Fournier v. Pinto, 408 F.2d 539 (3d Cir. 1969) (grant of habeas upheld where improper action of prosecutor, reinforced by trial judge's charge, denied fair trial); Hawkins v. Robinson, 367 F.Supp. 1025 (D.Conn. 1973) (habeas issued unless new trial granted, because state trial judge denied due process by not requiring informant's identity to be revealed).

The instant case is somewhat unusual in that Judge Goldstein's instructions to witness DiBari were not made in the presence of the jury. However, by coloring DiBari's subsequent testimony, Judge Goldstein's comments had the prohibited effect -- preventing a jury in the subsequent trial from receiving a presentation of the events that was not colored by the Court's opinion.

In fact, the prejudice may be greater than if the opinions had been voiced directly to the jury because the jury in the subsequent trial, which relied on DiBari's testimony in convicting petitioner, was not aware that DiBari had been instructed by Judge Goldstein as to what he was to say; and so could not discount DiBari's testimony to compensate for this coercion. In this respect, use of DiBari's testimony is like use of perjured testimony. In each situation, the testimony on which the jury will rely has been influenced by outside forces unknown to the juror. Knowing use of perjured testimony requires habeas relief. See e.g., Levin v. Katzenbach, 363 F.2d 287 (D.C.Cir. 1966); Mooney v. Holohan, 294 U.S. 103 (1935). Analogously, use of DiBari's coerced testimony requires habeas relief.

A. Judge Goldstein Denied a Fair Trial By Threatening to Prosecute DiBari Unless DiBari Incriminated Defendants

Judge Goldstein told DiBari that he would be prosecuted unless his testimony incriminated defendants. Any conduct of a judge which tends to intimidate a witness denies a fair trial. United States v. Pena-Garcia, 505 F.2d 964 (9th Cir. 1974); Garrett v. Bounds, 328 F.Supp. 1175 (W.D.N.C. 1971).

In Pena-Garcia, the Ninth Circuit reversed the conviction below because the District Judge had, by his questioning, intimidated a key witness. The "intimidation" was that the Judge, in cross-examining the witness, had evidenced disbelief of the witness' testimony and had made statements to the effect that he did not like to hear untruths from persons under oath. However, the judge therein did not directly threaten to prosecute the witness. Judge Goldstein's conduct went far beyond that of the judge in Pena-Garcia.

Garrett v. Bounds, supra, comes closer to the conduct in the instant case. There, after a witness testified, the judge reviewed the prosecution's file while on the Bench and in the presence of the jury. The judge then sent the

jury out and had the witness arrested. The witness' arrest was reported by the newspapers. The next day the witness "dutifully" gave testimony incriminating defendants. After the trial was completed, the perjury charge against the witness was "nolle prossed." Habeas was sought on the grounds, inter alia, that the witness had been intimidated by having the bench warrant served on him during testimony; that the Judge's conduct in reviewing the documents and thereafter violated due process, and that the publicity denied a fair trial. The district court held habeas relief was required because of the aggregate actions of the court and prosecution denied a fair trial. Analogously, in the instant case, witness DiBari's testimony at trial was the product of his having been intimidated in the mistrial hearing by Judge Goldstein's threat (reinforced by Assistant District Attorney Helfand) that he would be prosecuted if his testimony did not incriminate appellant. Just as the witness in Bounds was put in jail overnight when he failed to give the "correct" testimony, Judge Goldstein jailed DiBari (as a material witness) when DiBari refused to testify. See People v. Epstein, 42 App.Div.2d 1, 344 N.Y.S.2d 4 (1st Dept. 1973) (fair trial denied where, immediately after witness testified, and in front of the jury, the judge warned the witness he may have committed perjury, gave the

witness Miranda warnings and asked the prosecutor to present the perjury charge to a grand jury for action). See also Coleman v. State, 199 S.W. 473, 82 Tex.Crim. 332 (Crim.App. 1917).

Instructing a witness to testify the same way that the witness testified before the grand jury is error because, unlike instructing the witness to tell the truth (which gives the witness the chance to change his testimony from what he said to the grand jury, if his grand jury testimony was false), instructing the witness to repeat his grand jury testimony locks the witness into what may have been a prior misstatement and, as here, expresses the judge's opinion that the truth is the incriminating testimony the witness gave in the grand jury. Watkins v. State, 261 S.W.2d 274, 222 Ark. 444 (1953); see United States v. Bates, 468 F.2d 1252 (5th Cir. 1972). In Watkins, reversal was required because the trial judge told one witness, in front of the jury, that her grand jury testimony had been taken down and that if she told the same things two different ways she would be guilty of perjury, and told a second witness, out of the presence of the jury, that if she did not tell the same story before the jury that she told before the grand jury, she would commit perjury. The reviewing Court's comments

on the treatment of the witness instructed in Chambers are equally applicable to the situation with DiBari:

"We hold that the Trial Court went too far with this witness and that his admonition, threats of prosecution for perjury, and instructions to her in chambers, immediately following similar remarks (as indicated) to Anna Gregory before the jury, tended to intimidate her in testifying even though not said to her in the presence of the jury. She was not bound to testify exactly as she did before the Grand Jury. She had the right to change that testimony if it were not true and to testify as to the truth before the Trial Jury. The jury was entitled to the benefit of this witness' testimony given freely by her and without any intimidation by the trial judge and in an atmosphere free of threats or coercion. It was the jury's province to be the sole judge of whether such testimony was true or false." 261 S.W.2d at 277.

In Bates, the Fifth Circuit held that defendant's right to a fair trial was violated where the judge implied by his comments in the presence of the jury that the first (exculpatory) testimony given by a witness was a lie, and that the later (incriminating) testimony given by the witness was the truth. See also Young v. United States, 107 F.2d 490, 494 (5th Cir. 1939) where the district attorney threatened to prosecute a witness unless the witness gave at trial the same incriminating testimony he had given previously in sworn statements and to the grand jury. The Court of Appeals found that it would have been necessary to declare a mistrial, except that the witness changed his testimony despite the threat.

Viewed generally, the situation is analogous to that in United States v. Karnes, supra, where the Fourth Circuit held that the District Judge had denied a fair trial by calling two witnesses essential to the prosecution's case, which the prosecution itself had failed to call. In the instant case, Judge Goldstein not only forced DiBari -- the State's sole identifying witness -- to testify, but instructed DiBari as to what the content of his testimony was to be.

B. Judge Goldstein Denied a Fair Trial by Trying to Convince DiBari that Defendants Were Guilty and that DiBari Should Incriminate Them

Judges are restricted in expressing their opinions to the jury of defendant's guilt or innocence. United States v. Link, supra; McBride v. United States, supra; Davis v. United States, supra. The rationale for this restriction is the danger that the Judge's opinion, because of his authority and expertise, will be given undue weight by the jury. However, as some cases have noted, witnesses, as well as jurors, are susceptible to improper influence. See Callahan v. Lash, 381 F.Supp. 827 (N.D.Ind. 1974), where habeas was granted because of danger that television coverage of the trial may have unduly influenced jurors and witnesses. The court found that the TV coverage may have had the effect of:

"[I]mpairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, generally influencing the testimony of witnesses, and frustrating any separation of witnesses by having any one or more of them watch a preceding witness on television even if they were admonished not to do so. . . ." 381 F.Supp. at 833.

If an indirect influence could cause those effects, then the danger of the direct influence applied by Judge Goldstein is obvious. Witnesses are equally likely as jurors to give undue weight to a judge's opinion; and as discussed in Garrett v. Bounds, supra, are more susceptible to judicial pressure than juries, since the judge can threaten prosecution and jail if the witness does not testify in accordance with his views.

Here, Judge Goldstein not only told DiBari that Bruno, Carlucci and Loffredo were guilty; his comments to DiBari went far beyond what even a prosecutor could say at trial. Clearly habeas relief would be required if the prosecutor -- much less Judge Goldstein -- had, at the outset of trial informed the jury of Bruno's past record. E.g., Lane v. Warden, Maryland Penitentiary, 320 F.2d 179 (4th Cir. 1963) (habeas should issue where prosecutor, at the outset of trial, read to jury indictment which set forth defendant's prior convictions). Bruno's prior convictions

would not have been admissible at trial unless he testified. The policy underlying this rule is that the prejudice of such evidence outweighs its probative value, absent the defendant putting his character in issue. While the rule does not on its face prohibit telling a witness about a defendant's prior record, the information will have the same prejudicial effect on a witness that it would have on a jury, and is likely to be given even more weight because related by the judge. In the instant case, Judge Goldstein not only stated defendants were "notorious gunmen and robbers" who "have a record as long as your arm", he also described an additional alleged crime (shooting a policeman in Queens). This was not only highly prejudicial, but apparently erroneous, since Bruno contends,* that he was never arrested or indicted for such a crime.

Finally, there was the danger that DiBari would interpret the Judge's comments as meaning that, even if he couldn't identify the defendants as being the robbers, they were bad men whom he should put away anyhow. There is a very real danger that DiBari "stretched" his identification testimony to do precisely this. The cumulative effect of Judge Goldstein's comments requires the habeas relief sought in the instant petition.

* Bruno's coram nobis petition dated March 9, 1970 (Appendix, p.181) alleged -- and it was not contested -- that he was "never indicted or went to court" for the alleged offense.

II. THE UNNECESSARILY SUGGESTIVE SHOW-UPS,
WITH NO INDEPENDENT BASIS FOR IDENTI-
FICATION, DENIED DUE PROCESS

Although the two show-ups of petitioner Bruno, grouped together with Carlucci and Loffredo, occurred on April 4th and 5th, 1946, well before the Wade & Gilbert cases* established the right to counsel at lineups; these pretrial confrontations must still be scrutinized to determine whether the procedures followed violated basic due process rights. Stovall v. Denno, 388 U.S. 293 (1967). The applicable standard, as set forth in Stovall is whether, viewed in the totality of the circumstances surrounding it, the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification as to deny due process. Subsequent to Stovall, in Simmons v. United States, 390 U.S. 377, 384 (1968), the due process standard was further articulated as being a question of whether the pretrial confrontation was "impermissibly suggestive", raising "a very substantial likelihood of irreparable misidentification." Then in Neil v. Biggers, 409 U.S. 188 (1972), the Court described the due process test as a question of whether, under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive.

* United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

In the Supreme Court's view, "reliability" depends on such factors as: (i) the witness' opportunity to view the criminal at the time of the crime, (ii) the witness' degree of attention, (iii) the accuracy of the witness' prior description of the criminal, (iv) the level of certainty demonstrated by the witness at the confrontation and (v) the length of time between the crime and the confrontation. 409 U.S. at 199-200. Cases in the Second Circuit are consistent with these Supreme Court pronouncements, determining first whether a confrontation was unnecessarily suggestive, and if it was, determining whether there was nonetheless an independent basis for the identification. E.g., United States ex rel. Gerald v. Deegan, 292 F.Supp. 968 (S.D.N.Y. 1968); United States ex rel. Foreman v. Casseles, 311 F.Supp. 526 (S.D.N.Y. 1970). See United States ex rel. Rutherford v. Deegan, 288 F.Supp. 165 (E.D.N.Y. 1968), aff'd, 406 F.2d 217 (2d Cir.), cert. denied, 395 U.S. 983 (1969).

A. Consecutive Joint Show-Ups Were Unnecessarily Suggestive

Judge Platt, in his holding below, was correct in assuming the joint show-ups of Bruno, Carlucci and Loffredo were unnecessarily suggestive. E.g., United States ex rel. Phipps v. Follette, 428 F.2d 912, 913-14 (2d Cir.) cert.

denied, 400 U.S. 908 (1970); United States ex rel. Springle v. Follette, 435 F.2d 1380 (2d Cir. 1970) cert. denied 401 U.S. 980 (1971); Foster v. California, 394 U.S. 440 (1969). In Phipps, this Court held that a pre-Wade joint station-house show-up of two suspects was unnecessarily suggestive because of the danger that the witness would transfer the assurance of his recognition of one of the suspects to the other suspect.

In Springle, which involved a pre-Wade joint show-up of three alleged robbers, Judge Friendly in his concurring* opinion stated that the joint show-up was "unnecessarily suggestive" because:

"This was no 'one-man show-up,' which I agree is often allowable. Having seen three black men break and enter the apartment building, Mrs. Burke was shown three blacks and was told by the police 'these were the three men.' Apart from that strong suggestion, the exhibition of the three together, rather than separately, improperly enhanced the likelihood that although in fact she could only recall one or two, she would identify all three." (Friendly, J., concurring opinion of; 435 F.2d at 1385; emphasis added).

This was precisely the danger in the instant case. Moreover, here the overly suggestive show-up was repeated a second time; and the fact that a suspect is repeatedly displayed has

* Judge Friendly agreed that the out-of-court identification, though unnecessarily suggestive, was admissible because the witness had an independent basis for the identification.

itself been held to be unnecessarily suggestive. Foster,
supra, 394 U.S. at 443.

B. DiBari's Testimony is Suspect and
in Any Event, No Independent
Basis For His Identification of
Petitioner Bruno

Judge Platt found the joint show-ups did not violate due process because DiBari had an independent basis for his identification of the three defendants; holding that under the totality of the circumstances the identification was reliable, as defined in Neil v. Biggers, supra. Judge Platt correctly set out the Neil standard -- which is the applicable standard -- but made two errors in applying that standard.

The first error was the failure to consider the effect of Judge Goldstein's comments on the reliability of DiBari's testimony. Since the show-ups were unnecessarily suggestive, DiBari's identification of defendants must be discounted unless DiBari had an independent basis for making the identification. However, DiBari's testimony at trial as to what he was able to see during the robbery -- i.e., as to his "independent basis" -- is irreparably untrustworthy, because of the danger that Judge Goldstein's instructions caused DiBari to color his testimony on this point at the

subsequent trial.

Considering the effect of Judge Goldstein's comments in determining the reliability of the identification is consistent with the approach in United States ex rel. Springle, supra, 435 F.2d at 1384, where this Circuit, in determining the "totality of circumstances" affecting the identification looked not only at the circumstances surrounding the identification itself, but at the course of the trial as a whole. See also Conyers v. Wainwright, 309 F.Supp. 1101 (S.D.Fla. 1970) (the proceeding as a whole must be reviewed to determine whether due process was denied).

Second, even excluding the impact of Judge Goldstein's improper statements, and accepting at face value DiBari's testimony as to his opportunity to observe the robbers, that testimony reveals insufficient opportunity to observe petitioner under the factors* laid out in Neil. The first factor Neil discusses as bearing on reliability is opportunity to view the criminal during the crime. The District Court, in reviewing DiBari's opportunity to view the robbers, considers the witness' opportunity to view the robbers as a group, not his opportunity to view the only individual in the group which could have been petitioner Bruno.

* Summarized p. 27 supra, this brief.

This analysis has the same flaw that the joint show-up had -- it treats the defendants as a unit, instead of focusing on the witness' opportunity to view each of the three men separately. True, DiBari might have had sufficient opportunity to identify Loffredo, who allegedly stuck the gun in DiBari's ribs as soon as DiBari opened the door. DiBari's attention certainly would have been focused on the man menacing him with the gun, since that man (and not the unarmed men) was the immediate threat. If Loffredo was close enough to stick the gun in DiBari's ribs, it appears that Loffredo was the man in front, and that the other two men were behind him. Given the three-second time span, the lighting, the fact that he was not wearing his glasses, and his certain focus on Loffredo, it cannot be said DiBari had an independent opportunity to identify the other two men at that time. True, one of these other two men subsequently tied DiBari up, giving him an additional opportunity for observation, but DiBari identified Carlucci as the man who tied him up. There was no sufficient opportunity to view the third man, who stayed in the background throughout. Yet this third man is the man alleged to have been petitioner Bruno.

Nor did the court below apply the third element of Biggers -- the accuracy of the witness' prior description

-- to the facts of the instant case. This element too weighs against the reliability of the identification, because the witness' prior statement -- the Complaint,* sworn out by DiBari before being instructed by Judge Goldstein, reflects a lack of opportunity to make a prior description.

Likewise, the fourth element, the level of certainty demonstrated by the witness at the confrontation, also weighs strongly against reliability. If DiBari had been positive that Bruno, Carlucci and Loffredo were the three men who robbed him when he viewed them in the first show-up, it is highly unlikely that a second show-up of the same men, at a second stationhouse, would have been held. The fact that the police found it necessary to hold two consecutive show-ups suggests that DiBari was unable to identify defendants the first time they were shown to him -- even though they were suggestively grouped, and supports DiBari's having gestured to indicate non-recognition of the defendants, after the first show-up.

The fifth element discussed in Biggers is the time between the robbery and the confrontation. Whereas the four-month period is not in itself prohibitively long, the fact that the three men -- none of whom hid or fled -- were

* Quoted from at p. 5, supra.

not arrested until four months after the robbery suggests that DiBari had not given the police a working description of the robbers at the time of the crime.

In sum, almost all of the factors discussed in Biggers weigh against the reliability of the identification of any of the three men; and the record reflects that the witness' opportunity to observe the one of the robbers alleged to have been Bruno was substantially less than the opportunity he had to observe the men identified as Carlucci and Loffredo.

A quick review of the facts in Biggers reveals the situation there was totally different from the situation in the instant case. There the defendant had spent half an hour raping the witness, first grabbing her in her home, which was adequately lighted, and then dragging her outside under a full moon. At least twice she faced him directly and intimately; and immediately after the crime the witness gave the police a detailed description of the assailant, including his age, height, weight, voice, complexion, skin texture, and build. When she was shown the defendant seven months later she immediately identified him and had no doubt that he was the man who had raped her. Moreover, she had in the interim been shown other persons in lineups, show-ups

and photo displays and had not identified any of them as being her assailant. Even aside from the added element of Judge Goldstein coercing DiBari's testimony, the differences in the facts between Biggers and the instant case require different results.

III. THE ERROR WAS NOT HARMLESS

Under Chapman v. California, 386 U.S. 18, 24 (1967) constitutional error is not harmless unless the prosecution sustains the burden of proving the tainted evidence could not have affected the verdict. Chapman itself notes that trial by a judge who is not impartial can never be harmless error, citing with approval Tumey v. Ohio, 273 U.S. 510 (1927), 386 U.S. at 23 & n. 8. However, even if, in some circumstances, the conduct of Judge Goldstein, plus the effect of the show-ups, could have been harmless error, on the facts of the instant case these errors were fatal, not harmless. See United States ex rel. Wilcox v. Pennsylvania, supra, Conyers v. Wainwright, supra. Here there were no fingerprints or other physical evidence, no confessions, and no testimony, other than DiBari's testimony, linking petitioner or his codefendants to the robbery. Rather than having no effect on the verdict, DiBari's testimony was the sole basis for the verdict. Yet DiBari's identification

testimony, which convicted petitioner, was constitutionally unreliable on each of two grounds: (1) it was the product of the coercive and suggestive comments of State Judge Goldstein; and (2) it was the product of successive, unnecessarily suggestive show-ups of petitioner, grouped with his codefendants, to a witness who had no independent basis on which to base an identification.

CONCLUSION

The decision below should be reversed.

Dated: New York, New York
May 5, 1977

Respectfully submitted,

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